BELGIQUE

Rapporteur

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1st part

INTERNATIONAL JURISDICTION

Literature Part I – Part III : see enclosure

A. Sources

I. Traités internationaux

- Bilateral Convention between Belgium and France (8 July 1899, Belgian Act of 31 March 1900, *Moniteur Belge* 30-31 July 1900) (copy enclosed)
- Bilateral Convention between Belgium and the Netherlands (28 March 1925, Belgian Act of 16 August 1926, *Moniteur Belge* 27 July 1929) (copy enclosed)
- Both remaining in force regarding succession and wills (see articles 69 and 70 of the EU Resolution n° 44/2001 keeping in force the bilateral conventions between regarding subject matters not covered by the Resolution, such as succession and wills)

II. Sources nationales

- Articles 624, 635, 636, 638 Judicial Code
- Article 15 Civil Code
- Article 110 Civil Code

B. Chefs de compétence

C. Champ matériel d'application

Internationalement compétent en matière successorale à raison :

I. Du domicile du défunt

YES – According to article 635.4° Judicial Code foreigners can be sued before a Belgian court, either by a Belgian or by a foreigner, if the action concerns a succession that has fallen open in Belgium. According to article 110 Civil Code, a succession falls open in Belgium if the deceased has his last domicile in Belgium. In this case, the Belgian court will consider itself competent, regardless of the nationality of the deceased or of the location of movable assets. Regarding immovable property however, case law and some authors argue that the Belgian court would only be competent for immovable property situated in Belgium (see further).

The concept of domicile must be determined according to the lex fori. In this context reference is not made to article 36 Judicial Code (place of registration in the population

register) but to article 102 Civil Code defining the domicile as the principal establishment. This obviously is a question of fact[1].

The court is competent for actions enumerated in articles 627, 3° and 4° Judicial Code:

- Actions for distribution, and until such distribution, actions claiming the succession ("pétition d'hérédité"), and all actions between heirs and beneficiaries of a legacy,
- actions entered within two years after the moment of death, against the executor of a will, by the beneficiaries of legacies or creditors against heirs;
- actions entered within two years after the distribution, for nullity of distribution.

A similar rule has been formulated in article 7 of the bilateral convention with France (1899).

III. Du domicile du défendeur

According to articles 624, 1° and 635, 2°, 10° Judicial Code an action can be introduced before the judge of the domicile of the defendant or one of the defendants. On this basis an action for liquidation or distribution of a succession can be introduced in a Belgian court if one of the heirs, defendant in the case, has his domicile in Belgium. The Supreme Court requires that there must be one single action with the same object towards each one of the defendants[2].

IV. De la nationalité du demandeur ou du défendeur

Article 15 Civil Code states that a Belgian citizen can be sued before a Belgian court regarding obligations engaged by him abroad, even towards a foreigner. This article can justify competence for a Belgian court to judge liquidation and distribution of movables of a succession fallen open abroad. It cannot serve as a basis for jurisdiction regarding immovable property situated abroad.

Furthermore, the bilateral conventions with France (1899) and with the Netherlands (1925), still in application for succession matters, do regulate the conflicts between French and Belgian and Dutch and Belgian citizens. For French people in Belgium and vice versa, the same jurisdiction rules apply as for citizens of the country itself. The same principle applies for Dutch people. Article 1 § 3 of the convention with France explictly excludes the application of article 15 Civil Code. The same is presumed to follow from article 1.1 of the convention with the Netherlands[3].

VI. De la situation des biens

As has been stated, international jurisdiction for a Belgian court is retained for actions regarding immovable property situated in Belgium (article 635, 1° Judicial Code)[4]. Therefore, the Belgian court is competent to order a partial distribution of immovable hereditary assets situated in Belgium, being part of a succession that has fallen open abroad[5].

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1 Recent application: Court of first instance Ghent, 5 January 2001, *Tijdschrift voor Gentse rechtspraak* 2001, 84.

2 Cass. 5 June 1978, *Pasicrisie* 1978, I, 1143 with Annotation.

3 N. Watté, *Les successions internationales. Répertoire Notarial,* Brussels, Larcier, 1992, n° 276 (hereinafter cited as Watté).

4 Cass. 10 January 1907, *Pasicrisie* 1907, I, 85.

5 Cass. 31 October 1968, *Pasicrisie* 1969, I, 227.

However, even if the deceased's domicile is in Belgium, the Supreme Court has considered the Belgian court incompetent regarding immovable property outside Belgium, e.g. to order the distribution of such property[6]. There is indeed a clear tendency to limit the jurisdiction in order to bring it in line with the conflict rules (Gleichlauf). An exception to this rule are the principles laid down in some bilateral conventions, such as these with France and the Netherlands.

Outside the scope of these conventions, some authors however argue that the *forum hereditatis*-rule renders the Belgian court competent, also to judge about immovables abroad, notwithstanding the application of conflict of law rules that might lead to foreign succession law to be applied (see Part III)[7]. This implies that the Belgian judgement will need to be recognized and executed abroad. The latter aspect is precisely the argument why the majority opinion does not accept the Belgian court's competence in such a case and leaves it to the forum of the country where the property is situated.

VIII. D'un accord entre les héritiers

Although it is possible for the heirs to make an agreement regarding the distribution of immovables situated in different countries, it seems that competence must be retained for the courts of all countries involved, where such distribution agreement must be executed[8].

If both parties in a judicial action refer together to a Belgian court, that court will consider itself competent.

IX. De mesures conservatoires à prendre

Based on article 635, 5° Judicial Code the Belgian court will always be competent to order provisional or conservatory measures regarding hereditary assets situated in Belgium, such as putting the seals, making a notarial inventory or appointing a provisional administrator.

XI. D'un autre élément de rattachement

International jurisdiction of the Belgian courts can be based on the domicile of the plaintiff being situated in Belgium (*forum actoris)*, if there are no other grounds to bring a foreigner before a Belgian court (articles 638 Judicial Code). However, the foreigner has a right to reject (*in limine litis)* the Belgian jurisdiction, under the condition of reciprocity for a Belgian defendant to do the same in the country of that foreigner (article 636 Judicial Code). Article 1.2 of the bilateral convention with the Netherlands (1925) excludes the application of article 638 Judicial Code.

International jurisdiction of a Belgian court will also be accepted if the defendant has organised his defence on the merits of the case, without invoking the incompetence of the court.

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6 Cass. 31 October 1968, cited above.

7 G. Vanhecke & K. Lenaerts, *Internationaal Privaatrecht,* Brussels, 1989; second edition, n° 635-636 (hereinafter cited as Vanhecke & Lenaerts).

8 L.F. Ganshof, "Les conflits de jurisdictions en matière successorale en droit international privé belge", note sous Civ. Gand, 16 June 1970, *Revue Critique de Jurisprudence Belge* 1972, 450.

D.Vérification de la compétence

I. Le tribunal peut-il se déclarer d'office incompétent ?

No (see further under E)

II. Le tribunal compétent au regard des règles en vigueur peut-il se déclarer incompétent au profit d'un tribunal d'un autre Etat plus approprié ?

No

III. La compétence internationale des tribunaux est-elle affectée par l'exclusivité de compétence revendiquée par le droit d'un autre Etat ?

No (see however under E, in application of the bilateral convention with France of 1899)

IV. Le tribunal peut-il statuer si le défendeur ne comparaît pas ?

Yes – However, in application of article 636 Judicial Code, the foreign defendant who is not appearing in court is presumed to reject the jurisdiction of the Belgian court. Therefore, in that particular situation of article 636, the court will consider itself incompetent.

E. Litispendance et connexité

The problem of a multitude of procedures that might lead to contradictory decisions is solved by the principle of "litispendance" imposing that parallel procedures must be concentrated in one court. In the internal law of civil procedure, connexity is regulated in article 30 Judicial Code, leaving it to the discretionary appreciation of the judge. An extreme form of connexity is litispendance, as defined in article 29 Judicial Code. The material competence regarding litispendance is regulated by articles 565-566 Judicial Code. These rules also determine the territorial jurisdiction for questions of litispendance (article 634 Judicial Code).

In international cases, except international conventions deciding otherwise, a Belgian court must treat a case pending, even if the same issue is already pending before a foreign court[9]. Therefore, there is no socalled "exception of litispendance" rendering the Belgian court incompetent.

Such exception is formulated in article 7 of the convention of 1899 with France. The rule only applies to citizens domiciled in Belgium or France and to assets situated in Belgium or France. The court of the deceased's domicile has exclusive jurisdiction for the actions enumerated exhaustively in the first paragraph (corresponding with article 627, 3° and 4° Judicial Code: see above). § 2 of article 7 submits the actions brought before a Belgian court to the time limits enumerated in article 627, 3° and 4° Judicial Code (see above). The domicile court is solely competent, regardless of the movable or immovable character of the assets. Thus, a unity of jurisdiction is achieved, since the Belgian court will be exclusively competent, even regarding immovable property in France[10]. Therefore, a Belgian court will be incompetent to decide about the delivery of a legacy regarding immovable property in Belgium, belonging to a succession that fell open in France[11]. It is disputed whether the court must invoke its incompetence automatically. The court of first instance of

[9] Vanhecke & Lenaerts, n° 54.

[10] Recent application: Court of first instance Brussels, 17 December 1998, *Journal des Tribunaux* 1999, 608.

[11] Court of Appeal Liège, 9 May 1923, *Pasicrisie* 1923, I, 135.

Brussels did not feel obliged to do so, and considered itself competent, in spite of article 7, since the exception was not raised by the parties[12].

[12] Court of first instance Brussels 15 May 1974, *Revue du Notariat Belge* 1976, 203, Annotation Watté.

2nd part

RECOGNITION & EXECUTION OF DECISIONS

A. Sources

I. Traités internationaux

- Bilateral Convention between Belgium and France (8 July 1899, Belgian Act of 31 March 1900, *Moniteur Belge* 30-31 July 1900) and Bilateral Convention between Belgium and the Netherlands (28 March 1925, Belgian Act of 16 August 1926, *Moniteur Belge* 27 July 1929) (see Part I)
- Several other bilateral Conventions: see copy enclosed

II. Sources nationales

- Article 570 Judicial Code
- Article 586 Judicial Code
- Article 976, 999 Civil Code

B. Jugements étrangers

I. Les décisions étrangères en matière successorale sont-elles reconnues de plein droit ou leur reconnaissance est-elle subordonnée à une procédure de vérification a priori?

Foreign judgements first of all have an "effet de fait", meaning that they are accepted as a legal fact that must be taken into account.

Seconldy, the "effet de titre" implies that the foreign judgement is accepted as an authentic act, giving authentic value to certain facts that have been confirmed by the foreign judge, such as a witnessing or a confession. This "force probante" of a judgement is accepted if an expedition is delivered of the judgement, meeting the requirements of authenticity of the country where it has been rendered. If there is no exemption in a bilateral convention or treaty, it is required that the signature of the foreign official is legalised by a Belgian consul in the country concerned. For states that are party to the Hague Convention of 5 October 1961, the two-phased legalisation procedure is replaced by an apostille to be given by an authority in the country concerned. Furthermore, there is no legalisation or apostille requirement whatsoever for public acts (including judgements and notarial deeds) from France, Italy, Denmark and Ireland[1].

Thirdly, a foreign judgement may be recognised if it meets the conditions enumerated in article 570 Judicial Code, notwithstanding conventions or treaties deciding otherwise. In matters of status and capacity, a recognition de plano is granted, which means that no

[1] Act of 27 November 1996, introducing the EC Convention of 25 May 1987, *Moniteur belge* 18 April 1997.

preliminary procedure is necessary to have the foreign judgement recognised. This however does not mean that no preliminary investigation would be needed. Any public officer, notary or functionary of the government or the administration is obliged to verify the requirements of article 570 Judicial Code. Any interested party can bring an action for recognition before the judge, who will apply article 570 without getting into the merits of the case itself[2].

A recognition de plano seems to be limited to judgements concerning status and capacity and is therefore not applicable to judgements in succession matters[3]. Here a preliminary "exequatur procedure" requesting recognition of the judgement by the court is needed. The same article 570 Judicial Code applies but the judge will also look at the merits of the case ("révision au fond")[4] (see further under II). This does not apply if a bilateral convention is applicable. Then the judgement of such a country will be recognised de plano, without a preliminary exequatur procedure to be applied, also in succession matters.

The enforceability or execution of a foreign judgment is only possible if the exequatur procedure has been followed. The requirements are identical as in case of recognition of the judgement. Even if bilateral conventions do apply, for execution the exequatur procedure will be required.

II. La vérification de la décision étrangère porte-t-elle sur

a) sur la compétence du tribunal étranger?

b) sur la loi appliquée par le tribunal étranger?

c) sur l'ordre public.

The exequatur procedure, applicable as a preliminary requirement, in principle, for both recognition and execution of a foreign judgement in succession matters, is laid down in article 570 Judicial code. Besides the "révision au fond", the Belgian judge has to examine if:

- the foreign judgement does not contain any elements contrary to the internal public order or rules of Belgian public law;
- the rights of defence were respected;
- the competence of the foreign judge was not based exclusively on the nationality of the plaintiff;
- the judgement is final according to the law of the country where it has been rendered;
- the authenticated copy of the judgement meets the conditions of authenticity as required by the law of the country where the judgement was rendered.

The "révision au fond" requires the judge to verify if the foreign court did not make a mistake, in fact or in law. However, he may not repeat the litigation, modify the judgement, nor put himself in the place of the foreign judge.

In case of a recognition de plano, without a preliminary procedure, no révision au fond will apply. Such recognition applies in matters of status and capacity or in case a bilateral

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[2] It has been decided long ago that no "révision au fond" is to be applied in matters of status and capacity: Cass. 19 January 1882, *Pasicrisie* 1882, I, 36.

[3] Although some authors have argued that the de plano recognition should be broader (Vanhecke & Lenaerts, n° 144).

[4] Cass. 23 January 1981, *Pasicrisie* 1981, I, 547.

convention is applicable. Any Belgian official will, incidentally, analyse the foreign judgement on its conformity with the requirements of the convention, such as respect for public order, respect for rights of defence and the competence of the foreign judge.

III. Existe-t-il un régime particulier de reconnaissance et d'exécution des décisions gracieuses et administratives? Dans l'affirmative, donnez des exemples.

Judgements of a foreign arbitral court may be recognised and executed according to articles 1719-1723 Judicial Code. In case of arbitration, some treaties do apply (New York, 10 June 1958; European Treaty 21 April 1961; and several bilateral conventions).

Other foreign authentic acts are recognised and executed according to article 586 Judicial Code, and the rules laid down in bilateral and other conventions. Article 586 states in its third section that authentic acts other than those concerning mortgages on immovable property, can only be executed in case of a convention regarding such execution.

C. Autres actes

I. Testaments faits à l'étranger.

1. Existe-t-il une procédure de vérification des testaments étrangers?

2. Des distinctions sont-elles faites à cet égard selon la forme du testament?

Hague Convention 1961

According to article 999 BCC a Belgian citizen can make a will abroad, in the form of an holograph will (as determined in article 970 BCC) or by authentic act according to the formalities used at the place of making such act, or following international conventions in this respect.

Belgium has ratified the Hague Convention of 5 October 1961 on conflicts of law regarding the form of wills. Therefore, Belgium recognises wills drafted in accordance with the legislation:

a) of the country of the testator's nationality at the moment of the making of the will or at the moment of his death;

b) of the country of the testator's domicile at the moment of the making of the will or at the moment of his death;

c) of the country where the testator makes the will;

d) of the country where the testator had his habitual residence at the moment of the making of his will or at the moment of his death;

e) for immovable property: of the country where such immovable property is situated.

Since there is no reciprocity requirement (article 6), the country concerned need not be a party to the Hague Convention. According to article 10 of the Convention, Belgium has made a reservation for the recognition of a will that is merely oral, if made by a Belgian citizen with no other nationality, besides exceptional circumstances.

Article 4 allowing wills to be made by two or more persones in one single act is not in contradiction with article 968 BCC's prohobition on joint wills. The rule of article 4 concerns

the form of the will, while article 968 is a material requirement in order to protect the revocability of the will[5].

Formalities for holograph and international wills

All holograph and international wills (according to the Treaty of Washington 1973) must be presented to a notary who will apply the procedure of article 976 BCC. The notary opens the will and makes a notarial act of such opening and the situation of the will. Together with such act, the will is classified under the notary's official acts. Within one month of such opening, the notary must deposit a copy conform of the will and the act of opening at the court of first instance where the succession fell open. If the succession fell open abroad, this must be done at the court of first instance of the notary's professional domicile. These formalities do not only apply to Belgian wills, but to all wills, even foreign, found and used in Belgium.

Article 1008 BCC requires the universal legatee appointed in a holograph or international will, in the absence of forced heirs, to receive delivery of his legacy (i.e. to be put in possession) by an order of the president of the court of first instance of the place where the succession fell open. If there would be forced heirs, he would have to ask delivery to them (since they have the saisine) (see article 1004 BCC). If he would be appointed in a public will, in the absence of forced heirs, he would have saisine by virtue of law (see article 1006 BCC).

The question rises whether such order of the court is also required for a universal legatee apointed by foreign will. Although some controversy exists, it is reasonable to accept that such control would not be needed if the legatee can sufficiently prove his rights. The ratio legis of article 1008 is to control the sincerity of the document and the identity of the person claiming rights. If the legatee has a document proving his rights, such as a foreign certificate of inheritance or a grant of probate delivered by a Probate Court, the procedure of article 1008 BCC would not be applicable.

Formalities for public or notarial wills

Wills drafted in the form of a notary act (public will) do not fall under the procedure of article 976 BCC. An authentic testament passed before a Belgian notary must be registered within four months after death (article 32 Code of Registration Taxes), and has executory force as any other authentic act.

A foreign will shall be accepted as a public will if it has been made by a foreign notary, in a country knowing the latin notary system (cf. Union du Notariat Latin). This is not the case for Anglo-American public notaries, who might have certified the signature of the testator. Such act cannot qualify as a public will. Therefore the procedure of article 976 BCC must be applied.

The foreign public will with executory force in its country of origin should be recognised as such in Belgium. There is no problem if there is a bilateral convention (compare article 16 of the convention of 1899 with France). In the absence, one falls into the general rule of article 586 BCC (see above). In practice, the Belgian notary uses a certified copy of the foreign will or he deposits a copy of the foreign will under his authentic acts, and then makes on that basis the attestations that are needed[6].

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5 H. Jacbos, *Répertoire Notarial, Les testaments (forme),* Brussels, Larcier, n° 296.

6 Watté, n° 214.

II. Actes établissant la qualité d'héritier

See above.

D. Question commune aux jugements et autres actes

La production d'un jugement étranger, d'un testament fait à l'étranger, d'un acte établissant la qualité d'héritier ou encore d'un acte étranger de partage suffit-elle :

I. pour obtenir la modification des registres de propriété?

Transcriptions in the mortgage register of immovable property can only be made based on authentic documents and for causes of transition regulated in article 1 of the Mortgage Act[7]. These are acts inter vivos regarding transfer or determination of immovable rights, determination or change of rights of usufruct etc., as well as lease contracts for periods of more than nine years. Acts mortis causa, such as wills, must and cannot be registered[8]. Obviously, notarial acts on distribution of a succession, including immovable property, must be registered.

In principle, foreign authentic acts are deposited with a Belgian notary, who makes an act of depot, which is then registered. However, based on the recognition rules of foreign notary acts, it seems that mortgage registrars could also accept transcription of such foreign notary acts.

II. pour obtenir d'un dépositaire, p.ex. un banquier, remise des fonds ou autres biens dépendant de la succession?

Banks will not release the accounts of a deceased unless they have received an akte van bekendheid/acte de notoriété or more often, a notarial declaration of devolution, drafted by a notary in which the latter states the identity of the deceased, the devolution and the identity of the heirs and their shares. If the notarial declaration is foreign, it will be recognised according to the rules described above.

Moreover, upon death of a Belgian resident, banks and financial institutions have a double duty: one of information and one of temporary blocking of funds[9]. First of all the tax authorities must be informed about the existence of bank accounts, effects, bank safes (articles 96-101 Inheritance Tax Code). Upon death, bank safes must be sealed. Before opening such bank safe, the tax authorities must be informed by registered mail four days in advance in order to give them the opportunity to be present at such opening. An inventory of the content of the safe must then be made.

The second duty is one of refusing to release the funds or effects if they belong, even partially, to heirs or beneficiaries domiciled abroad (article 95 Inheritance Tax Code). This duty to block lasts as long as such heir or beneficiary has not delivered guaranty for payment of succession taxes (article 94 Inheritance Tax Code), unless a certificate of the tax authorities is delivered.

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7 See A. Verbeke & J. Byttebier, "Onroerende en hypothecaire publiciteit", in *Goed onroerend informeren,* Bruges, Die Keure, 2001, 105-163.

8 One exception is article 1069 BCC.

9 See H. Casman, "De bank en het overlijden van de cliënt", in *Actuele ontwikkelingen in de rechtsverhouding tussen bank en consument,* Antwerp, Maklu, 1994, 129-131.

Insurance companies established in Belgium are under a legal obligation to notify the tax authorities of any insurance contract regarding tangible movable assets, concluded by the deceased and/or his spouse (article 103/1 Inheritance Tax Code).

3rd part

CONFLICT OF LAWS

A. Littérature

See enclosed list

B. Traités internationaux

I. Quels sont les traités internationaux que la Belgique a ratifiés et quels sont les traités déjà signés ?

a) Convention de la Haye 1er août 1989 sur la loi applicable aux successions à cause de mort :

Not operative yet.

Not signed by Belgium.

b) Convention de la Haye du 5 octobre 1961 sur les conflits de lois en matière de forme des dispositions testamentaires

Belgian Act of 29 July 1971, *Moniteur belge* 29 December 1971.

Operative in Belgium since 19 December 1971

c) Convention de la Haye du 2 octobre 1973 sur l'administration internationale des successions

Not signed nor ratified by Belgium.

d) Convention de la Haye du 1er juillet 1985 relative à la loi applicable au trust et à sa reconnaissance

Not signed nor ratified by Belgium.

e) Convention de Washington du 26 octobre 1973 portant loi uniforme sur la forme d'un testament

Belgian Act of 11 January 1983, *Moniteur belge* 11 October 1983.

Operative in Belgium since 21 October 1983.

f) Convention de Bâle du 16 mai 1972 relative à l'établissement d'un système d'inscription des testaments

Belgian Act of 13 January 1977, *Moniteur belge* 6 May 1977.

Operative in Belgium since 9 May 1977.

g) Convention de la Haye du 14 mars 1978 sur la loi applicable aux régimes matrimoniaux

Not signed nor ratified by Belgium.

h) Benelux Convention and Annex on Commorientes, Brussels 29 December 1972

Belgian Act of 19 September 1977, *Moniteur belge* 10 January 1978.

Operative in Belgium since 1 September 1978, *Moniteur belge* 28 september 1978.

Integrated in the BCC as articles 721-722.

II. Traités bilatéraux avec des Etats européens

See above and see enclosure indicating several bilateral conventions

C. Les règles nationales de conflits de lois en matière successorale

I. Sources du droit

- Article 3 Civil Code
- Case law and doctrine

II. Rattachement objectif de la dévolution successorale légale et testamentaire

1. La succession intégrale est-elle dévolue sur la base d'un seul ordre juridique ou est-ce que, pour la dévolution successorale, il faut faire la différence entre les biens meubles et les biens immeubles ?

Intestate succession

The Belgian conflict rule is a "disiunctive" rule, not leading to unity of succession. The lex successionis governing the intestate succession differs according to the character of the hereditary assets.

(1) The law of the "last domicile" of the deceased governs succession to movable property anywhere in the world[1]. The Benelux Treaty of 11 May 1951 determining the law of the nationality of the deceased as criterium has never entered into force.

(2) The law of the place of physical location, the *lex rei sitae*, governs succession to immovable property.

The qualification of assets as immovable or movable is determined according to the lex fori. However, there is a strong tendency to require that the lex rei sitae should at least be consulted.

The concept of domicile is determined according to the lex fori, in our case article 102 Civil Code (see Part I). It is the place of one's principal establishment at the time of death. A special problem arises for diplomats and officials of various international organisations working in Belgium. Unless they have the Belgian nationality, diplomats will be considered to have maintained their domicile abroad, insofar as they were not domiciled in Belgium before they were posted to Belgium. Members of permanent delegations with the Council of NATO and with the EU, as well as certain high officials in NATO, the Belgian-Luxembourg Economic Union, the OECD, and the International Cotton Institute have diplomatic status as

[1] Recent application: Court of Appeal Brussels, 21 October 1998, *Rechtskundig Weekblad* 1999-2000, 645.

well. Members of foreign consulates, have a similar status insofar as they do not pursue any commercial activities in Belgium[2].

There may be as many succession masses as there is immovable property in different countries. On each of these masses, the applicable succession law must be applied. However, renvoi should be taken into account (see further).

Testate succession

1. The intestate lex successionis determines to what extent a valid will may have effect. Highly important in this respect are the forced heirship (or legitim)-rules. The capacity to make a will, the consent of the testator and the form of the will may be governed by other laws than the lex successionis (see further).
2. not applicable
3. not applicable
4. Règles spéciales pour des questions juridiques déterminées

a) la capacité de tester

The general capacity to dispose of assets is determined according to the law of the nationality (article 3 alinea 3 Civil Code). This nationality must be determined at the moment of the making of the will. A later change of nationality will not affect such capacity. A minority view is of the opinion that the rule of article 904 Civil Code regarding capacity to make a will for minors, is to be governed by the lex successionis.

It should be noted that the general capacity to receive a gift is equally determined by the law of the nationality. However, there are some particular situations of incapacity to receive a gift (such as a guardian from his pupil or a doctor from his patient: see articles 907, 909, 997 Civil Code). Here a controversy exists between the lex successionis, the law of the nationality, a cumulation of these law, or the accessory rule applying the law governing the institution from which the incapacity follows[3].

b) testaments rédigés par plusieurs personnes sous la forme d'un acte

Regarding the form of such will, it may be valid if the will has been made according to a legislation in conformity with the Hague Convention 1961. As to the content, this is to be determined according to the lex successionis. Materially, Belgian law forbids joint wills (article 968 BCC) as a violation of the principle of revocability of wills (see Part IV).

c) contrats d'établissement de dévolution successorale ou renonciation

This is to be determined by the lex successionis. Except for some limited explicit exceptions regulated by law, under Belgian material law, contracts regarding a succession are invalid (see part IV).

d) validité rédaction de testament

The validity of the consent of the testator and possible lack of free consent is to be determined according to the lex successionis. Some authors however have defended the

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2 T.J. Lyons, *Capital Taxes and Estate Planning in Europe,* London, Sweet & Maxwell, loose-leaf, 128, n° 59.

3 See Watté, n° 25.

view that the law of the nationality at the moment of making the will should govern this question[4].

III. Rattachement subjectif

1. Le droit successoral faisant foi dans votre Etat est-il déterminé exclusivement par des règles de rattachement objectifs ou est-ce que la loi ou la jurisprudence admet le choix du droit successoral faisant foi?

There is no possibility to make a choice for a subjective lex successionis. This means that such a choice would not be binding, and not be accepted as setting aside imperative rules of the lex successionis. However, suppletive rules could be set aside by a choice of law.

2. Not applicable

3. Dans le cas de l'inadmissibilité d'un choix du droit

a) le choix du droit fait-il l'objet de projets législatifs ou l'introduction du choix est-elle prônée dans la littérature? No

b) Quelles sont les raisons pour l'introduction ou le refus d'un choix de droit?

Probably the strong attachment to forced heirship rules in Belgian law. Choice of the lex successionis would be a simple way to circumvene this protection, considered by some to be of public order.

IV. Plusieurs ordres juridiques applicables en même temps

The different succession masses are governed by the different succession laws (see above). If upon death of a Belgian resident, the deceased leaves immovable property abroad, foreign succession law applies for the succession of such immovable property. Forced heirship (legitim) rules must be applied to each one of the succession masses.

If in one country, there are no forced heirship rules, on that succession mass, heirs, even of a deceased of Belgian nationality with last domicile in Belgian, will not have a forced heirship. A correction to this rule is the droit de prélèvement of article 912 BCC (see infra V and also Part IV)

It is on the other hand also possible for a heir with legitim to receive in each of the different masses protected shares that are in sum larger than if he would have had a forced heirship under one single law[5].

V. Compensation dans le cas de règles différentes d'un autre droit applicable au lieu de la situation des biens.

Article 912 BCC provides that in case of division of an estate comprising assets situated outside Belgium, co-heirs who are not nationals of that foreign State may levy against all assets in Belgium, of whatever kind, a portion equal to that proportion of the assets in that country from which they would be excluded, on whatever grounds, by virtue of local laws and

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4 P.F. Ghorain, Rapport belge, in *Régimes matrimoniaux, successions et libéralités. Droit international privé et droit comparé, Tome I,* Neuchâtel, Ed. De la Baconnière, 1979, n° 117; M. Verwilghen, Les lois applicables aux successions internationales", in *J'hérite à l'étranger,* Brussels, KFBN, 1984, n° 128.

5 Watté, n° 207.

customs. This privilege may be invoked by Belgians and foreigners alike, except persons who have the nationality of the particular foreign country.

This special regime does not seem to be applied frequently in practice[6].

VI. La dévolution successorale et le régime matrimonial.

To decide which law determines the matrimonial property regime of an individual's property, a distinction must be made:

a) If both spouses have the same nationality, the applicable law will be the common national law of the spouses.

b) If both spouses do not have the same nationality, Belgian law determines the applicable law by reference to the first stable matrimonial residence of the spouses.

The conflict rules for matrimonial property and for succession law are not coordinated and very often lead to the application of different material laws. In this regard, it should be kept in mind that matrimonial property law comes first. Suppose two Dutch citizens domiciled in Belgium, with no marital contract. Upon death of the husband, the Dutch total community property will govern the matrimonial property issue. Half of the common estate, being the succession of the deceased, will then devolve according to Belgian succession law.

Obviously, this situation may lead to a double protection as well as a total absence of protection. Some authors argue that in such case the judge should have the possibility to correct the situation based on the theory of adaptation[7]

VII. Le rattachement de la forme de testaments et d'autres dispositions pour cause de mort

See Part II regarding the Hague Convention of 5 October 1961.

VIII. Ordre public successoral

The Belgian Cour De Cassation established the definition of international public policy in a judgement of 4 May 1950 (*Pasicrisie* 1950, I, 624): A law of internal public policy (ordre public) is only one of international public policy to the extent that the legislator has intended to create, by the provisions of that law, a principle which is considered essential to the established moral, political or economic order.

In general it is accepted that the exception of international public policy can be an obstacle to the normal application of the designated foreign law. Since public policy is a concept that varies in time and space it is impossible to determine what foreign law is considered incompatible with Belgian international public policy. In any case, before the exception of international public policy can be invoked, the following must apply:

a) There must be a serious incompatibility of the foreign law with the essential principles of Belgian law;

b) The effects claimed in Belgium by the application of the foreign law must be "aggressive" from the point of view of the *lex fori*;

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6 Recent application: Court of first instance Arlon, 21 December 2000, *Revue du Notariat Belge* 2001, 325, annotation Bouckaert.

7 Rigaux, I, n° 474; Watté, n° 100.

c) the succession link to Belgium must be sufficiently strong to justify the eviction of the foreign law.

Les règles suivantes d'un droit étranger seraient-elles acceptées par le droit de votre Etat ?

If the answer to the question is no, it means that the exception of international public policy could be invoked.

a) parts successorales différentes pour les héritiers masculins et les héritiers féminins :

No

b) interdiction d'hériter pour les enfants naturels

No

c) droit successoral légal des concubins ou des partenaires homosexuels

Yes

d) refus d'accorder un droit à la part réservataire

Yes

e) limitations légales ou contractuelles de la liberté de tester

Yes

f) force probante de testaments et de pactes successoraux

Yes

g) renonciation des héritiers légaux du défunt de leur vivant avec force obligatoire

Yes

h) dispositions testamentaires du défunt avec effets discriminatoires

Probably, if the reserved portions are respected.

i) d'autres exemples

Other discriminatory rules that would not be accepted, include age, race, religion.

Not accepted would be a foreign rule declaring a succession has fallen open as a consequence of a penal conviction of an individual. The institution of « mort civil » has been abolished in the 19th century.

Succession rights for a spouse based on a polygamic marriage validly concluded abroad, probably would be accepted.

IX. Renvoi et rattachement subordonné

In general, Belgian law accepts the application of *renvoi* in the first degree in matters of personal status, succession law and matrimonial property. This means that if the foreign conflict rules referred to by the Belgian conflict rules lead back to Belgian law, then Belgian material law will be applied. There is almost no case law. However, the mechanism is often used in Belgian notarial practice, as much for succession to movables as to immovables. Application of *renvoi* sometimes enables one to have resort to a single law controlling the whole succession.

A classic example is the death of a Belgian citizen leaving immovable property in Spain. The Spanish conflicts rule (for the immovable property) referring to the nationality of the deceased, is accepted as referring back to Belgian succession law, in order to apply one succession law, both to the movable as to the immovable assets[8].

X. Rattachement de questions préalables

Determining the conflict rule for preliminary questions is subject to controverse in Belgium[9], at least among commentators. There is almost no case law. There seems to exist some preference for an autonomous attachment based on the lex fori[10].

XI. Portée du rattachement en matière successorale

Causes

The lex successionis governs the causes for a succession to fall open. In principle this is following death. Other causes might run against international public order (see above).

A controversy exists regarding rules on missing persons: some apply the lex successionis, others the national law of the missing person.

The succession falls open upon death, which may cause some problems in case of death in accidents or disasters. The Benelux Convention of 29 december 1972 creates the presumption of simultaneous death if the order of dying cannot be established. The issue should be settled by the national laws of the heirs in question, and subsidiary in case of contradiction. by the lex fori.

Rules of indignity are in principle governed by the lex successionis.

Intestate

The lex successionis determines the intestate devolution. This includes the technique of devolution, indicating who are the heirs and in what order, rules on representation, limitation of degree, the extent of heirship, the nature of the heirship rights, the rules on forced heirship, the rules regarding anomal successions.

The lien of filiation is determined by the national law. This different rule for issues concerning the personal status could raise some difficulties when concepts or notions are used that are unknown in the lex successionis. Then, one has to fit in the relevant concept of the personal law into the applicable succession law.

Testate

As indicated, the lex successionis also determines the testate devolution: that law decides to what extent the intestate devolution can be set aside by the personal wishes of the deceased as made up in a will (or gift or donation). The nature of a legacy, universal or at a specific title, is determined according to the lex successionis. The same goes for delivery of a legacy and its eventual caducity.

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8 Court of Appeal Antwerp, 22 April 1986, *RGEN* 1987, n° 24318, 70.

9 Watté, n° 92.

10 Vanhecke & Lenaerts, n° 322.

As has been said, it is also the lex successionis that will tell us where the margins or limits of free disposition are to be put: who can claim a forced heirship, to what extent and of what is the nature of such a protected right?

Transmission of possession and administration

According to the majority opinion it is the *lex successionis* which determines the law applicable to transmission of possession and administration. Issues are the option for heirs to accept or renounce, the formalities for possession, and for transferring assets, power of testamentory executor, powers of administration, liability for debts, powers of liquidation.

The option for a heir to accept or not, the time lapse and formalities prescribed for such option, the consent or lack of consent in making the choice, the consequences of such option, all of it is determined by the lex successionis. But the capacity whether or not a person can accept, and eventual formalities or conditions as for minors, is determined by his national law (being a question of status – article 3 alinea 3 BCC).

As far as transmission of possession and administration of immovable property is concerned, succession law and the law of the location of the assets coincide. The latter will determine where *saisine* is conferred and will designate, where necessary, the persons who can intervene to administer the immovable property.

Transmission of possession and administration of movable property is subject to the law of the last "domicile" of the deceased. If a foreign law is applicable and by that law a foreign administrator is appointed, this administrator will be allowed to take possession of movable assets situated in Belgium to the extent that his appointment is recognised as valid in Belgium. If required by the lex successionis, the Belgian court will issue an order for possession (envoi en possession) (see above). The administrator or executor will however need to follow the exequatur procedure if he wants to engage in acts of execution towards hereditary assets, e.g. to claim delivery of assets held by an heir.

Issues of distribution of the estate (partage) are in principle governed by the lex successionis.

4th part

APERCU DU DROIT INTERNE SUCCESSORAL

A. Sources et littérature

I. Les Sources du droit

- Articles 718-1100 BCC

Littérature et Jurisprudence

- Selected general bibliography:
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- Examen critique de la réserve successorale, Brussels, Bruylant, Tome I and II, 1997, Tome III, 2000
- See also the regularly updated and very substantial case-law chronicles in such law journals as Tijdschrift voor Privaatrecht, Revue Critique de Jurisprudence Belge and Journal des Tribunaux.

Adde for marital property law:

- Casman, H, *Huwelijksvermogensstels*, Antwerp: Kluwer, loose-leaf;
- Gerlo, J, *Handboek Huwelijksvermogensrecht*, 4th edition, Bruges, Die Keure, 2001;
- Raucent, L, *Les Régimes Matrimoniaux*, 3rd edn, Brussels/Louvain-la-Neuve, 1988;
- Verbeke, A., *Goederenverdeling bij echtscheiding,* Antwerp, Maklu, second edition, 1994, with summary in English
- Verbeke, A, (general reporter) and Cretney, Grauers, Malaurie, Ofner, Savolainen, Skorini-Paparrigopoulou, van der Burght, "European Property Law Survey 1988-1994", *European Review of Private Law*, 1995, pp 445-482.
- Verbeke, A., *Le contrat de mariage de séparation de biens,* Antwerp, Kluwer, 1997

B. La dévolution successorale légale

I. Le droit successoral de la parenté

Only persons who are blood relatives of the deceased, living at the time of death, may inherit, if there is no will. The only exception is the surviving spouse, who is a legitimate heir even although not blood related.

The blood relatives may be divided into three lines:

(1) the descending line (the children and their issue);

(2) the ascending line:
   - the privileged ascendants (the parents);
   - the ordinary ascendants (the grandparents and their ancestors);

(3) the collateral line:
   - the privileged collaterals (the brothers and sisters of the deceased and their issue);
   - the ordinary collaterals (the brothers and sisters of the deceased's parents and their issue).

To determine who of these blood relatives may inherit, it is necessary to establish first the category and, secondly, the degree within the category.

Category

A category is a group of blood relatives. Four categories exist:

(1) The first category of descendants (all the children or descendants of the deceased, whether legitimate, natural or adopted, have the same rights to inherit).

(2) The second category of privileged collaterals and privileged ascendants (parents) if they come up with privileged collaterals.

(3) The third category of ascendants (including parents if there are no privileged collaterals).

(4) The fourth category of ordinary collaterals

Degree

Articles 737 and 738 BCC determine the method of calculating the degree of proximity. When considering the direct line, there are as many degrees as there are generations of persons. In the collateral line degrees are counted by reference to the number of generations from the deceased up to but not including the common ancestor, and from the latter down to the other relatives.

The deceased is related in the first degree towards his parents and his children; in the second degree towards his grandparents, grandchildren, brothers and sisters; and in the third degree towards his great-grandparents, great-grandchildren, uncles and aunts.

The inheritance rights of the ordinary collaterals are restricted to the fourth degree, except where relatives at a further degree inherit by representation (article 755 BCC). There is no restriction by degree in the other categories of heirs.

Devolution

To determine the hereditary rights of blood relatives, it is necessary to look first at the categories. Heirs who are members of the first category exclude all others. Heirs from the second category exclude members of the third and fourth category, and so on. However, the technique of splitting will correct this basic rule in some cases.

Secondly, to determine the rights between the heirs in the same category, the degree will be decisive. The nearest degree will exclude all other heirs who are in a further degree related to the deceased. Here, the technique of representation will operate as a correction.

In the second category, some special rules apply in favour of parents. If two parents are coming up with brothers and sisters, each parent gets one quarter and the other half is shared equally between the brothers and sisters per capita, eventually corrected by representation. If one parent died, three quarters go to the brothers and sisters. If there are no parents left, the brothers and sisters share the entire succession.

First corrective mechanism: representation

A first correction is obtained through the technique of representation. The rule of representation permits a potential heir to step into the shoes of and so receive the share that his predeceased ascendant would otherwise have inherited (article 739 BCC). This is a legal fiction that allows an heir to take the place of his ancestor who is already dead at the moment the succession has fallen open. The conditions for application of representation are to be considered both as to whose place can be taken, and who can take the place.

It is possible only to take the place of a person:

- who predeceased (not someone who renounced the succession);

- who had capacity to inherit (not unworthy);
- who was a descendant, brother or sister, uncle or aunt of the deceased.

That place can be taken only by a person:

- who is a descendant of the person whose place is taken (he may have renounced the succession of the latter);
- who has capacity to inherit.

If two or more persons are inheriting through representation they inherit per stirpes (as opposed to per capita). This means they inherit as one person, in lieu of the one person they represent, so that they will have to divide, in equal shares, the portion of the predeceased heir whom they represent.

Second corrective mechanism: splitting

In some circumstances the succession is split into two lines: the paternal and the maternal line. One half of the succession then goes to heirs who are blood related through the father, the other half to heirs who are blood related through the mother.

The technique of splitting must be applied if there are heirs from the third or fourth category (article 746 BCC). A limited application of splitting is made in the second category if there are half brothers or half sisters (article 752 BCC). The heir who is the nearest in category and degree within that line (article 733 BCC) inherits the one-half part of the succession going to one line. However, if there is no heir in one of the lines, the property devolves entirely upon the other line (article 755 BCC).

Splitting in the second category

If there are half brothers and sisters, a limited splitting is applied. The succession is divided in a paternal and a maternal line, each receiving one half of the succession. Half brothers and sisters inherit only in the line of the common parent. Full brothers and sisters inherit in both lines.

Splitting in the third category

If parents are coming up without brothers and sisters or if only ordinary ascendants are left, the third category applies a full splitting. One half of the succession goes to the paternal line, the other to the maternal line. In each line the nearest category excludes the others, and within that category, the nearest degree excludes the others.

If there are two parents left, each gets one half. If father is still alive, and the grandmother from mother's side, they both get one half. If a parent is coming up with an ordinary collateral from the other line (fourth category), both receive half of the succession, but a correction is added in favour of that parent: he will additionally get one third of the collateral's half in usufruct (article 754 BCC).

Splitting in the fourth category

If only ordinary collaterals are present, the full splitting applies. It is important to note that one cannot inherit if one is related further than the fourth degree, except if one is coming up by representation.

II. Est-ce qu'il y a des particularités par rapport aux enfants naturels, aux enfants adultérins ou aux enfants adoptés ?

Since the Act of 31 March 1987, no matter how filiation has been determined, children and their descendants have the same rights and obligations towards their parents and relatives, and vice versa (article 334 BCC). However, filiation has to be legally and definitively determined. This is not possible if the determination of filiation would reveal an incestuous relationship between the child's mother and father, both horizontally (brother and sister) and vertically (father and daughter, or mother and son) (articles 313 § 2, 314, second alinea and 321 BCC).

Children born in and out of wedlock enjoy the same rights and, as such, the same inheritance rights. Children born out of wedlock are full and regular heirs, enjoying the saisine and a reserved portion (see further) in the same way as other descendants. However, some discrimination still exists in relation to succession rights of children born out of wedlock.

- First, article 828, first alinea BCC, states that heirs whose relationship with the deceased has been established only after the latter's death and who did not demand their inheritance rights within six months from the opening of the estate, cannot question the validity of acts performed in good faith by other inheritors, nor can they demand their share in assets regarding property that has been alienated or distributed by the other inheritors after the six-month period has elapsed. According to the second alinea of article 828, these heirs may demand their share in value.
- Based on article 837, first alinea BCC, the surviving spouse or descendants of a marriage, during which adultery was committed, may demand that a child of an adulterous relationship who has not been raised in the family dwelling be excluded from inheriting hereditary assets. The descendants of the marriage have no such right if the marriage was dissolved before the opening of the succession (article 837, third alinea BCC). The child of the adulterous relationship will receive his share in value (article 837, second alinea BCC).

The status of an adopted child differs according to the form of adoption. In the case of simple adoption (adoption simple) the child retains all his inheritance rights in his natural family. He has the same succession rights in the estate of the adopter as an ordinary legitimate child, except as regards the relatives of the adopter (article 365 BCC). In the case of full adoption (adoption plénière) the child loses all inheritance rights in respect of his natural family, but is completely assimilated into his adoptive family (article 370 BCC).

III. La vocation successorale du conjoint survivant et l'influence du régime matrimonial

General observations on marital property law

In order to understand the property rights of a surviving spouse it is necessary to take into account the spouses' marital property regime. A fundamental principle is that marital property comes first, followed by succession. Therefore, if community property exists, which is automatically dissolved in case of death of one of the spouses, this community must be settled, liquidated and distributed before one can deal with succession. Even if there is separation of property, the marital property situation must be settled first. One should not forget that spouses, who are married with separation of assets, very often have joint property, which must be divided between them.

In Belgian law, as in all continental legal systems, the concept of marital property law refers to that set of specific rules dealing with the patrimonial consequences of a marriage. Two different regimes may be discerned in Belgian marital property law.

First, the *basic marital property system or primary regime* defines the mutual rights and obligations of husband and wife. It contains basic rules both on the personal and patrimonial level, and applies to all marriages, whether or not there is a marital contract (articles 212-224 BCC). Patrimonial rules are, for example, that the family home may not be sold without consent of the other spouse, that spouses are jointly liable for household debts, and that a gift *inter vivos* or personal security given by one spouse may be declared null and void if requested so by the other spouse before a certain date and if proven to endanger the family interests.

The *secondary regime* regulates the patrimonial aspects of marital life, both during and upon dissolution of the marriage. This regime may be chosen by the spouses through a *marital contract*. If the spouses do not make such a choice, a statutory system is applied, which is called the *legal regime*.

The Belgian legal regime is a system of community property limited to the marital gains. Thus, besides the community property, there are two other patrimonies, i.e. the separate property of the husband and of the wife (article 1398 BCC). Common are the assets acquired during the marriage for value or consideration. Premarital goods and assets acquired during the marriage by way of succession, will or gift are separate property. There is a presumption of community property. Income from professional activity is automatically and by virtue of law community property. Income from separate property falls into the community, unless provided otherwise by marital contract.

It is possible to make a prenuptial contract adapting the community property regime by limiting or extending the community, or by introducing other distribution rules than the fifty-fifty rule, in favour of a surviving spouse. Another type of matrimonial property regime is the separation of property, that can be combined with a limited internal community or with participation mechanisms giving one of the spouses an obligatory claim towards the other upon liquidation of the system. It is possible to change the marital property system during the marriage, by notarial act. For major changes strict material (interest of the children and third parties) and formal requirements (court approbation, publication) must be met.

Marital property law comes first

In the case of death, the marital property system must first be settled. In the case of community property, one half of the community (subject to any contractual modification) goes to the surviving spouse by virtue of marital property law, and has nothing to do with succession law. The other half of the community property passes under the law of succession. In the case of separation of property, all property of the deceased belongs to his estate, including his share in co-owned property.

The surviving spouse is a regular and full heir

The surviving spouse is a regular statutory heir who enjoys the *saisine*. Such regular heir enjoys the rights and claims of the deceased. However, he is also required to pay the debts of the estate.

Only a spouse, who, at the time of the death of the deceased, was still married to the latter, is considered to be a surviving spouse (article 731 BCC). Divorced or judicially separated

spouses cannot qualify to inherit from their former partner. If the spouses lived, in fact, separately at the time of death, in principle the surviving spouse will inherit. However, it is possible for the deceased to disinherit his spouse through a will, if certain conditions are met.

Intestate rights of the surviving spouse

According to article 745bis § 1 BCC the intestate inheritance rights of the surviving spouse vary according to what other heirs are present. Three situations may be discerned.

The first situation occurs when the deceased leaves descendants, adopted children or their descendants. The children do not necessarily have to be born of the marriage of the deceased with the surviving spouse. In this case, the surviving spouse will receive the usufruct (life interest) in the entire estate (article 745 bis§1, first alinea BCC), while the nude property will be divided equally between the descendants, eventually with application of representation.

Secondly, if the deceased leaves no descendants but other inheritors, the surviving spouse receives full ownership of the share of the predeceased in the community property (if any) and usufruct in the deceased's separate property (article 745 bis §1, second alinea BCC). Thus, the surviving spouse receives full ownership of the entire community property, half of which is obtained by virtue of marital property law (see above), and the other half by virtue of inheritance law. This rule clearly favours spouses married under a community property regime. If a house was community property, the surviving spouse will be full owner for the entirety; if a house was joint property in a regime of separation of assets, the surviving spouse will be full owner of his own half share, and only have a right of ususfruct in the other half belonging to the inheritance, in which he will have to tolerate the rights of the deceased's blood relatives.

Thirdly, if the deceased leaves no other inheritors, the surviving spouse receives full ownership of the entire estate (article 745 bis §1, third alinea BCC).

The inheritance rights of the surviving spouse have resulted in a decline of the traditional inheritance rights of the descendants of the deceased, who have to await the death of the surviving spouse before they will have full ownership of the estate.

For other inheritors, the situation is even worse. They lose their rights to the community property, and only receive an interest in the separate patrimony of the deceased that only matures on the surviving spouse's death.

Specific rules concerning the right of usufruct of the surviving spouse

The division of inheritance rights in usufruct and bare ownership during the usufruct may cause some practical problems. Often, heirs prefer full ownership. Notwithstanding any stipulation to the contrary, an heir receiving bare ownership may require that for all property subject to usufruct an inventory of real property and a list of personal property be made. He may also require that the sums of money be invested and that bearer securities be, at the choice of the surviving spouse, be converted into registered securities or deposited in a joint bank account (article 745ter BCC).

Moreover the law makes it possible to convert usufruct either into full ownership of the hereditary assets burdened with usufruct, into cash, or into a price-indexed and guaranteed annuity (article 745quater-sexies BCC). In practice, this is an important device. There is however few case law on this subject, because most of the time the conversion is negotiated and settled in a deal or transaction between the spouse and the nude property owners, such as e.g. children out of a previous marriage.

IV. Le concubin ou le partenaire homosexuel.

The only measures taken for cohabitants concern inheritance taxes. No measures were taken concerning succession law. Cohabitants are thus considered as third persons. Therefore, they cannot inherit intestate nor do they have a protected heirship. They can only inherit based on a will.

V. La vocation successorale de l'état.

Only persons who are blood relatives of the deceased, living at the time of death, may inherit, if there is no will. The only exception is the surviving spouse, who is a legitimate heir even although not blood related. If there are no blood relatives, the surviving spouse will inherit everything.

If there is no spouse then the succession is without an heir, and the State may inherit (article 768 BCC). If no one claims the estate (including the State) and any heirs that are known have renounced, the succession will be declared vacant (article 811 BCC).

VI. Exemples

Exemple 1

The spouse will receive, by virtue of matrimonial property law, half of the community of gains in full ownership.

The other half of the community together with the separate property of the deceased constitutes his succession. It is inherited in usufruct by the spouse and in nude property by the common child.

Exemple 2

The same as above except that the nude property now goes for one half to the child and for one half to the grand-child, by representation.

Exemple 3

The spouse receives full ownership on the entire community property. On the separate property of the deceased she will receive usufruct while the nude property thereof will go for one quarter to the mother and for 3/8 to the brother and 3/8 to the niece by representation for the deceased sister.

Exemple 4

Mother receives one quarter in full ownership and brother and niece each 3/8.

C. La rédaction de dispositions pour cause de mort

I. Quel âge minimum est requis pour la capacité de tester ?

The majority age is 18.

A minor of 16 years old has the capacity to dispose of his assets by will, but only for half of the assets an adult would be allowed to dispose of (article 904 BCC). Article 907 BCC forbids dispositions in favour of the guardian.

An exception for minors under 16 (article 903 BCC) is article 1095 BCC regarding gifts in a marital contract in favour of the spouse, with assistance of the minor's parents.

II. Les formes de dispositions pour cause de mort

1. Quelles formes de dispositions pour cause de mort y a-t-il ?

Under Belgian law, there are three valid forms of will: the holograph will, the public will, and the international will (article 969 BCC).

- A holograph will is one that is entirely hand-written, dated and signed by the testator (article 970 BCC). For the will to be valid, the person making it must write it himself. A typed will is void, as is one drawn up by someone else.
- The will made by public deed is one that is written down by a notary in the presence of two witnesses, or by two notaries. Certain general conditions that apply to any notarial act must be satisfied. In addition, some particular and very strict formalities regarding the witnessing, signing and form of the will must be satisfied (see articles 971 to 975 BCC).
- The international will consists of both a private document and a notarial act. This was introduced by the Act of 2 February 1983 enacting the Treaty of Washington of 1973.

The private document: The will may be written by the testator or by someone else and may be handwritten or typed in any language. However, it may not contain materially testamentary dispositions by two or more persons (see article 968 BCC – see above).

The testator declares in the presence of two witnesses and a notary that the document is his will and that he knows the contents of it. In the presence of these persons the testator signs the will or acknowledges his signature. The international will is invalid if signed by a person other than the testator.

The notarial act: The purpose of the notarial act is to prove that the formalities have been complied with. Article 10 of the Law of 1983 determines its form and subject matter.

2. La forme du testament international est-elle utilisée de façon significative ?

After almost twenty years, it seems that a majority of the Belgian notaries still is not using the international will and adheres to the public will. There are however some notaries in larger firms, who never make a public will and always use the international will. In my own practice as an attorney especialised in estate planning, and therefore making numerous concepts of wills, I have always used the international will.

3. Statistiques

Unknown to me. If necessary, I will contact the Federation of Notaries.

4. Validité testaments priviligiés

Military wills : 6 months after the moment the testator has returned in a place where it is possible to make a normal will (article 984 BCC).

Wills made in a place blocked because of deceases : 6 months after returning into a normal situation or place (article 987 BCC).

Martime wills : 3 months after being on land again (article 996 BCC)

III. Le dépôt et l'immatriculation de testaments

1. Où les testaments sont-ils déposés et immatriculés ? Y a-t-il un registre central de testaments ?

2. Les testaments étrangers peuvent-ils également y être déposés et les personnes étrangères ont-elles le droit de prendre connaissance du dépôt et de l'immatriculation ?

The existence of the holograph will may be registered in the central register of wills (registre central des testaments). Rather than merely keeping the will in a safe, the notary may draw up a notarial act of deposition of the will, which certifies the date of the will. At the same time, the testator may witness his writing and his signature. In that case existence of the will must be registered in the central register of wills, unless the testator has explicitly dismissed the notary to do this.

The existence of the public and international will must also be registered in the central register of wills.

The Central Register of Wills is kept in Brussels by the Royal Federation of Belgian Notaries.The Federation arranges for the registration of a will in other countries and it answers all questions relating to the existence of and the place where a will is kept.

D. Les dispositions pour cause de mort

I. Y a-t-il une différence entre la dévolution successorale universelle (institution d'héritiers) et une dévolution successorale partielle (legs)? +

There certainly is a difference between inheriting as a heir or as a legatee. Among legatees, a distinction is made between the universal legatee (who will receive the entire succession or what is left after delivering other legacies), the legatee under universal title (called to receive a abstract portion of the estate) and the specific legatee (called to receive one specific or particular asset) (see articles 1002-1024 BCC).

Belgian law deals with the transmission of assets in the estate by adopting the system of direct factual possession (*saisine*). From the moment of death the heirs seized have the right to take possession of all assets, rights and actions of the deceased (article 724 BCC). Transmission of the inheritance operates directly and is not administered by a separate body (such as executors or administrators) as in common law countries. Under *saisine* an heir may take possession of the assets in the deceased's estate, administer them, derive any benefits from them and represent the estate in any litigation. He may exercise these rights even when he has not yet accepted the inheritance. However, he should be careful, because several actions may lead to the conclusion that he tacitly accepted. Ownership of hereditary assets only follows from accepting the succession (with retroactivity until the moment of death) (see further).

Certain categories do not derive their rights as from death, but must seek an order for possession (*envoi en possession*) from the court. That order confers *saisine* on them. This applies where the deceased's estate passes to the State. It also applies to the universal legatee, not faced with reserved heirs, whose title derives from either a holograph will, or a will in international form. On the death of the testator, such wills must be presented to a notary who executes the formalities laid down in article 976 BCC. If such a legatee was appointed in a public will, he would enjoy the *saisine* (see above).

In all other cases, be it that of a universal legatee faced with reserved heirs claiming their rights or of a legatee under universal title concerning a share of the estate or a specific legatee, delivery of the legacy is required. Delivery is not subject to any particular formality.

II. Les legs du défunt ont-ils des effets réels ou purement obligatoires (Legs particulier par lequel le légataire ne reçoit qu'un droit personnel sur la chose léguée ; legs par lequel le légataire devient directement propriétaire de la chose léguée)

Legacies have an effect in rem and give a property right towards the assets. However as indicated above, a distinction must be made between the property right and being put in possession. Therefore, delivery of the legacy is required.

III. Exécution testamentaire et institutions comparables

The law permits the testator to appoint one or more persons to supervise the implementation of his wishes; such persons are known as testamentary executors (*exécuteurs testamentaires*) (article 1025 BCC). They can only be appointed by will. In principle, the duties of a testamentary executor involve keeping a watchful eye over the heirs in the interest of the legatees.

However, the will may confer *saisine* on the testamentary executor, which permits him to take possession of movable assets belonging to the estate, for a period of no longer than one year and one day. The heirs are therefore deprived of the administration of the movables. The testamentary executor must have a notarial inventory drawn up. He has power to sell the assets if there are insufficient funds to discharge all the legacies for which he is responsible. One year after death of the deceased, he must render account for his management of the estate (article 1031 BCC).

IV. Autres

Parental distribution (articles 1075-1080 BCC)

Parents and other ancestors may make a distribution and division of their assets to their children and remoter issue. This may be undertaken by inter vivos or mortis causa deeds under the conditions and formalities prescribed for inter vivos and testamentory gifts. Where such distribution is made inter vivos, it may only involve existing assets.

E. Dévolutions successorales spéciales pour certains biens successoraux

- **Act of 16 May 1900** concerning modification of the devolution for small successions, *Moniteur belge* 21-22 May 1900, applicable to succession containing immovable property with a fiscal revenue not exceeding 1561,73 Euro.

  For several notaries, this system is of importance. However, in a more international practice, this act is completely irrelevant. I have never had a case where this Act was to be applied.

- **Act of 29 August 1988** concerning the devolution of agrarical enterprises in order to promote their continuity, *Moniteur belge* 24 September 1988, erratum 15 November 1988

  This act provides for a right to take over movable and immovable property of the agrarical enterprise at a certain price. Same remark as above as to its practical importance.

- The Act of 22 December 1998, *Moniteur belge* 15 January 1999, has introduced a special regime of gifts by notarial act of a company or shares therein, enjoying under certain strict conditions a tax privileged regime of 3% (articles 140bis-140octies Code of Registration Taxes). Simultaneously a second alinea has been added to article 922 BCC indicating that gifts done under the regime of article 140bis must only be added to the fictive hereditary mass (see further) at their value at the time of donation (in lieu of at the moment of death). It is obvious that this new regime is of great importance for the estate planning practice, both for fiscal and for family planning reasons.

F. Pacte successoral et contrats comparables

An individual may not by any deed or agreement dispose *inter vivos* of any right or asset that will or may form part of a future estate (article 1130 BCC). An agreement regarding succession to a living person's estate is forbidden if that agreement purports to renounce merely contingent rights in such a future estate, or parts thereof. The prohibition on materially conjunctive wills (article 968 BCC) has already been discussed above.

Agreements concerning future inheritance rights are considered contrary to public policy (*ordre public*) and are, in principle, ineffective. Some examples of prohibited agreements are an agreement by which one appoints an heir; a legacy or promise of a legacy made by a contract in return for some consideration; a deed (unilateral or bilateral) by which a presumed heir renounces his future hereditary entitlement.

Belgian law does, however, provide for some exceptions to the rule prohibiting agreements on future inheritance rights. The most important are as follows:

Formal nomination of an heir

The formal nomination of an heir (*institution contractuelle*) is an agreement otherwise than for valuable consideration by which one disposes of all or part of the assets of one's estate for the benefit of another person. Such nomination is permitted only in the following cases:

1) A third party may make a nomination in favour of one or both of the future spouses in a marriage contract (article 1082 BCC).

2) The spouses themselves may make such a nomination in the marriage contract (article 1093 BCC). These gratuitous nominations may be modified or revoked by the spouses by agreement, in accordance with the formalities applying to the modification of marriage contracts (articles 1394 to 1396 BCC).

3) During the marriage such a nomination may be made by the spouses in a deed modifying the matrimonial regime or by a simple notarial act. It is advisable that such nomination be undertaken by separate deed in order to ensure its revocability in the event of later doubts (article 1096 BCC).

Succession agreement under article 918 BCC

Both the sale and the gift with reservation of usufruct rights or any other life interest contracted by the deceased with one of this descendants must be taken into account in ascertaining the estate's disposable share for the entire full ownership value of the property. However, the other heirs with a reserved portion may explicitly agree with and intervene in such act, thereby waiving their rights to claim the eventual reduction of such transaction, because of infringement of their protected heirship rights.

- Another example is the parental distribution, already mentioned above.

G. Part réservataire

I. La nature du droit

The freedom of a person to dispose of his assets by will is limited in most continental legal systems through the traditional mechanism of forced heirship or legitim or reserved portion. It is a share of the inheritance, of which these heirs may not be deprived and therefore protects them against all excessive gifts by the deceased.

The Belgian forced heirship is an inheritance right. The protected heir has a property right towards hereditary assets and must not be content with a mere claim or obligatory lien. He has an absolute right to receive his legitim "en nature", in hereditary assets, and unburdened.

II. Qui a droit à une part réservataire ?

The legitim is traditionally guaranteed to certain heirs (children and ascendants), because of their close blood relationship with the deceased. In Belgium, in addition to blood relatives, since 1981 also the surviving spouse is entitled to a legitim. To claim a legitim one must have inheritance rights and, accordingly, an unworthy heir or a person who has renounced the succession could not claim a legitim.

Blood relatives with a reserved portion are, first, the children (and their issue if coming up through representation) (articles 913 and 914 BCC). Their protected heirship and the free disposable shares vary according to the number of children (article 913 BCC). Where a child predeceases leaving issue, that issue will inherit his share *per stripes*.

Secondly, the ascendants also enjoy a forced heirship (article 915 BCC). This applies only if the ascendants are called to the succession; for the parents this might be in the second category; for the other ascendants it applies only from the third category on (see supra).

It is important to note that ascendants cannot claim a reserved portion against the surviving spouse (article 915, second alinea BCC). However, if the deceased has no descendants, the ascendants who are in need at the time of his death may claim maintenance from his estate up to the amount of the inheritance rights which they lose because of gifts to the surviving spouse (article 205*bis* § 2 BCC).

In the Belgian Parliament, a controversy arose concerning a reserved portion for the surviving spouse. Advocates argued that this right was inevitably connected with the recognition of the surviving spouse as a full and regular heir. Opponents found this reserved portion to be impractical and technically unrealisable. Moreover, the adversaries argued, it imposed a new and undesirable limit on a married person's freedom to dispose of his assets by testament as he wishes.

A compromise was found. The surviving spouse enjoys a reserved portion, but it is merely analogous with his intestate right, *usufruct*, and not a reserved portion in full ownership. Moreover, unlike the reserved portion of others, the deceased or a judge may, under strict conditions, deprive the surviving spouse of this right.

III. Quel est le montant de la part réservataire ?

The reserved portion is determined as a fixed share of the succession, varying according to the type of protected heir, the number of heirs, and the other heirs present.

Reserved portion of blood relatives

First of all descendants:

No of children	*Global reserve*	*Individual reserve*	*Disposable share*
1	1/2	1/2	1/2
2	2/3	1/3	1/3
3	3/4	1/4	1/4
4	3/4	3/16	1/4

If ascendants are called to the succession, their reserved portion is one quarter of the succession for each line where ascendants are participating as heirs. In such line, the nearest ascendant is protected.

Reserved portion of the surviving spouse

The surviving spouse enjoys an abstract or concrete reserved portion, whichever he chooses. The abstract or quantitative reserved portion is the right to *usufruct* in half of the property of the estate (article 915bis § 1 BCC). The concrete or qualitative reserved portion is the *usufruct* in the immovable property serving on the day of the opening of the succession, as principal family dwelling and the furniture therein (the socalled preferential assets) (article 915bis § 2 BCC).

Both rights are a minimum. If the principal family dwelling and furniture would represent more that 50 per cent of the estate, the protected *usufruct* rights over these preferential assets will stand (see article 915bis § 2, third alinea BCC). If these assets would be valued at less than half the estate, *usufruct* rights over other assets will be added in order to obtain the abstract reserved portion, being the *usufruct* in one half of the estate.

If the surviving spouse shares with other heirs who benefit from a reserved portion, the spouse's reserved portion will proportionally burden the heirs' reserved portion and the disposable portion (article 915bis § 4 BCC). That is in the situation that the testator wants to give this disposable portion to a third party. If he wants to maximise the inheritance position of his spouse, then he can give her the entire disposable portion, and the children will have to tolerate entirely the burden of that spouse’s *usufruct* rights (see article 1094 BCC).

Number of children	*Maximum amount of gifts or legacies to surviving spouse*
1	1/2 in full ownership 1/2 in usufruct (over the children's reserved share)
2	1/3 in full ownership 2/3 in usufruct (over the children's reserved share)
3 or more	1/4 in full ownership 3/4 in usufruct (over the children's reserved share)

In competition with all other blood relatives (ascendants or collaterals), the surviving spouse may inherit the whole estate, because the ascendants lose their own forced heirship right in relation to the surviving spouse.

Unlike the traditional blood-legitim, the reserved portion of the surviving spouse may be taken away. However, the surviving spouse who is in need at the time of the death of his or her partner, may invoke article 205bis § 1 BCC and claim maintenance from the latter's estate.

First of all the surviving spouse may be disinherited form the abstract legitim (usufruct over half the estate) under the following conditions, laid down by article 915bis § 3 BCC. The deceased must write a will divesting the surviving spouse of his reserved portion. Secondly, the spouses must have lived separately on the day of the death for more than six months. Thirdly, the deceased must have requested a separate residence before his death, by legal action, either as plaintiff or defendant. Finally, the spouses may not have resumed cohabitation after that legal action. If these conditions are met, the surviving spouse is automatically disinherited. The judge has no discretionary power.

If these conditions are not met, the surviving spouse invariably receives this abstract reserved portion. However, the concrete legitim (*usufruct* over preferential assets) may still be lost in the case of factual separation. In this hypothesis, the *usufruct* in principle applies to the house in which the spouses had established their last conjugal residence and the furnishings therein, but only if, first, the surviving spouse continued living there or had been prevented against his or her will from living there and secondly, the awarding of such *usufruct* is equitable (article 915bis § 2, second alinea BCC). In this situation the surviving spouse is not automatically disinherited. The judge has discretionary power and will determine whether or not it is equitable to award *usufruct*. The court will examine which one of the spouses is guilty of the factual separation.

Thus in case of factual separation, if the surviving spouse is living in the last family dwelling, he will enjoy his concrete legitim, unless descendants can prove that this is not equitable. If the surviving spouse does not live in the last marital residence, he will obtain such legitim only if he proves that he left the home involuntarily, and that it is equitable to award him such *usufruct*.

IV. Délai

Thirty years

V. Les donations du de cujus ou les contrats matrimoniaux sont-ils respectés lors de la détermination des droits à la part réservataire?

Reduction

The calculation of the reserved portion is not done on the basis of the assets present upon death, but on the basis of a fictive hereditary mass, which must be established mathematically. Therefore, all gifts inter vivos done by the deceased, whenever, are added to the existing assets. They must be added according to their status at the time of the gift, but according to their value upon death (article 922 BCC with the recent exception for shares and companies in alinea 2 as has been explained supra).

After deduction of the debts, the net result constitutes the fictive hereditary mass. On this basis the fixed share of forced heirship must be calculated. The remaining part of the succession is disposable. To that disposable part, first, the gifts which have been made and, secondly the testamentary dispositions, are imputed. If the total figure would exceed the disposable portion, it must be reduced. The heirs with a reserved portion may then enter a claim for reduction of testamentary dispositions or gifts inter vivos. Legacies are reduced first and then the gifts, beginning with the latest one (article 923 BCC).

Restitution (hotchpot)

This mechanism of reduction should not be confused with the mechanism of restitution or bringing into account of gifts.

In principle, every gift made to a person who has inheritance rights on the donor's death is presumed to be a simple advance of his inheritance. Upon death of the donor or testator the heir who has received the gift is obliged to make restitution or bring it into account. Through this process of bringing into account, the law tries to put all the heirs on the same footing before division of the estate. However, the donor may expressly exempt an heir from the obligation to make restitution.

Marital benefits

Benefits following from the matrimonial property regime or its functioning, composition, distribution are marital benefits that are considered to a large extent to be benefits for value or consideration. Therefore, these are not gifts and must not be added to the fictive hereditary mass and do not risk the danger of reduction because of violating forced heirship rights.

To this basic principle two extremely important exceptions are formulated in articles 1464 and 1465 BCC. The first one governs situations where only common children are present. A limit is determined above which the benefit of the surviving spouse is qualified as a gift, to be added to the fictive mass. As long as the spouse does not obtain more than all the marital gains, his or her own input into the community and half of the input of the deceased, no gift is present. If there are children from a previous relation, then the limit is much lower. The ratio legis is logical. Such children cannot be expect to await the death of the surviving spouse to inherit. Indeed, since that spouse is not their parent, they will never inherit intestate from him or her. Therefore, what the surviving spouse receives above half of the marital gains and his or her own input into the community, must be considered as a gift.

H. Renonciation à la succession ou à la part réservataire

A person who has the right to inherit is under no obligation to accept the inheritance (article 775 BCC). The law permits him either to accept the inheritance "pure and simple", or to renounce it, or to accept the inheritance under the privilege of an inventory, i.e. without liability for debts beyond the assets inherited.

This option cannot be imposed by the deceased. The option is indivisible and therefore can only be exercised in respect of the whole of the inheritable estate. The option is an independent personal right and is not affected by the choices of other persons entitled to inherit. The effects of the option are determined by law and cannot be modified by a term or condition. In principle, the option once taken is irrevocable. On the opening of the succession process every person with inheritance rights may exercise the option. Special provisions exist for the various categories of persons lacking capacity. The option may be exercised during a period of 30 years after the opening of the succession process (article 789 BCC).

Renunciation of inheritance rights and liabilities will not be presumed. The formalities to be satisfied are prescribed by article 784 of the Civil Code. A declaration must be made to the registry of the court (*tribunal de première instance*) in the district where the succession process was opened. It is recorded in a register kept for that purpose.

I. L'ouverture de la succession et la transmission du patrimoine du défunt aux successibles

I. L'ouverture de la succession

The succession process can only be opened at the moment of the death of an individual (article 718 BCC). The place where a succession "falls open" is the place of the last domicile of the deceased.

II. Quelles sont les dispositions de la Belgique relatives aux comourants (les personnes qui décèdent dans un même évènement)?

If two or more individuals die in circumstances where it cannot be determined who died first, the deaths are held to have occurred simultaneously (article 721 BCC, introduced by the Law of 9 December 1977 enacting the Benelux Treaty on commorientes of 29 December 1972).

III. La succession est-elle acquise directement ou indirectement par un acte juridique (acceptation, envoi en possession, hereditas iacens) ; y a-t-il un autre ayant droit qui intervient (executor administrator)?

See above regarding saisine and transmission of the estate.

Adde:

An heir who accepts the inheritance under the benefit of an inventory is obliged to administer the succession. He must render an account of his management to the creditors and the legatees (article 803 BCC).

In certain situations administration of the estate is conferred:

- on a curator for a "vacant" succession, where no heir presents himself (article 813 BCC) (see supra);
- on a provisional administrator appointed in cases of urgency by the president of the court of first instance.

IV. L'acceptation de la succession et la renonciation

Acceptance "pure and simple"

On acceptance "pure and simple" the person entitled to inherit the estate receives the benefit of all the assets of the deceased and the burden of all his debts. Acceptance can be express or tacit. Express acceptance occurs if one declares oneself as an heir in an authenticated or private document (article 778 BCC).

Tacit acceptance may be adduced from the heir's behavior. If the heir carries out acts that necessarily imply his intention to accept and which he would have no right to de except in his capacity as heir, tacit acceptance is presumed (article 778 *in fine* BCC).

Renunciation

See above

Acceptance under benefit of inventory)

An heir who accepts *sous bénéfice d'inventaire* is only held liable for the debts of the deceased to the extent of the assets that he receives out of the deceased's estate. His own property is immune from claims of creditors of the deceased. A declaration must be made to

the registry of the court in the jurisdiction where the succession process commenced, and the declaration is also published in the *Moniteur belge* (article 793 BCC). A notarial inventory that is faithful and exact as to the assets in the estate must be drawn up (article 794 BCC).

Forced acceptance

An heir who has diverted or concealed the deceased's assets is deprived of his right to renounce the inheritance and remains an heir "pure and simple" without having any right in the diverted or concealed assets (article 792 BCC).

V. Y a-t-il des limitations de l'acquisition pour cause de mort par des étrangers (en particulier en ce qui concerne les immeubles) ?

No

K. La responsabilité des héritiers et les possibilités de limitation de la responsabilité

I. Les héritiers héritent-ils des actifs et des passifs ?

On acceptance "pure and simple" the person entitled to inherit the estate receives the benefit of all the assets of the deceased and the burden of all his debts.

An heir who accepts *sous bénéfice d'inventaire* is only held liable for the debts of the deceased to the extent of the assets that he receives out of the deceased's estate (see above).

II. S'il y a plusieurs héritiers, sont-ils tenus solidairement ou à concurrence d'une quote-part?

The heirs are liable for the payment of any debts of the deceased, according to their inherited share, unless for indivisible debts. Then the heirs will be held jointly towards the creditor (obligatio).

III. La responsabilité est-elle limitée à la succession ou l'héritier est-il également tenu personnellement ? Comment les héritiers peuvent-ils limiter leur responsabilité ?

As mentioned above a distinction has to be made between the pure acceptance and the acceptance under the benefit of inventory.

L. Pluralité d'héritiers

I. Structure

The succession forms an indivision. The heirs or the general legatees will administer the estate. If there is a testamentory executor he will have limited rights of administration (cf. supra). Nobody can be forced to remain in indivision: therefore such division can be requested at any time, unless an agreement to the contrary that cannot last longer than five years (article 815 BCC). This period is renewable. If immovably property is concerned, such agreement to continue the indivision must be registered at the mortgage office (see above).

II. Partage

Upon distribution of the inheritance, all heirs obtain hereditary assets, since they all have property rights. If assets cannot be distributed between them, any heir (article 827 BCC) can

require a public sale. Upon distribution, lots must be constituted as much as possible containing an equal quantity of movable and immovable assets, rights and claims of equal value (article 832 BCC).

If all heirs are of majority age and they are all present, the distribution can be done by agreement as they think fit (article 1205 Judicial Code). If a minor is among them, then the distribution must be made by notarial deed, under the presidency and with the approbation of the Justice of the Peace (article 1206 Judicial Code). In case of disagreement, there will be a judicial distribution. For that purpose, any of the heirs can enter such request before the court of first instance (article 1207-1225 Judical Code).

M. Cession d'une part successorale

An individual may not by any deed or agreement dispose inter vivos of any right or asset that will or may form part of a future estate (cf. supra).

An heir can transfer to another heir his share in a succession that has fallen open. If however this transfer is made towards a third party who is not an heir, even if the latter would be a blood relative of the deceased, then such third party can be excluded from the distribution of the estate, by all heirs or even by one of them, under the condition that the price he has paid is paid back to him (article 841 BCC). The Supreme Court has decided that this rule only applies to transfer of shares in the succession and not to transfer of an undivided share in a specific asset belonging to the succession[1].

N. Preuve de qualité d'héritier (et de la qualité d'exécuteur testamentaire ou de qualités comparables).

Any death of Belgian residents must be reported at the registry office in the town hall of the place where the person died. Such declaration of death is made by two persons, preferably relatives. The registry office will then notify the tax authorities of the death.

An akte van bekendheid/acte de notoriété, or more often a declaration of inheritance, is drafted by a notary in which the latter states the identity of the deceased and the devolution, with the identity of the heirs (cf. supra).

O. Réforme

Although reform of the forced heirship rules has been advocated in legal doctrine (see *Examen critique de la réserve successorale,* Brussels, Bruylant, Tome I and II, 1997, Tome III, 2000 and Verbeke, A., "De legitieme ontbloot of dood? Leve de echtgenoot!", *Tijdschrift voor Privaatrecht* 2000, 1111-1236, with summaries in English, French, German and Spanish; second revised edition under de same title as book in the series *Ars Notariatus,* Kluwer, Deventer, 2002, to appear), it does not seem that major changes can be expected in that respect.

Recently a very limited and specific proposal has been introduced and discussed in Parliament, making it possible for spouses in a second or further marriage, if there are children from previous relations, to arrange for the abolishment of the surviving spouse's forced heirship protection in a

[1] Cass. 22 April 1994, *Rechtskundig Weekblad* 1994-1995, 634.

marital contract (prenuptial or during the marriage)[2]. It is highly probable that this regulation will be enacted soon. The reason is that this regulation is needed to solve the personal situation of an important liberal politician who is going to engage in such a marriage.

[2] Proposition de loi modifiant certaines dispositions du Code civil relatives aux droits successoraux du conjoint survivant, 29 April 2002, *Chamber, Doc. 50* - 1353/005 and 1353/006.